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Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*

Dear Ms. Dortch:

This letter outlines the reasons that, where a given network element such as switching no longer has to be made available on an unbundled basis under § 251 of the Act, to the extent that element still must be unbundled under § 271, the terms under which it has to be made available are exclusively within the authority of this Commission and cannot be regulated by any state.

1. As an initial matter, and as we previously explained elsewhere, a determination by this Commission that a given network element need not be unbundled under § 251 is binding on and cannot be preempted by the states.

Indeed, the Act expressly assigns to "the Commission" the task of "determining what network elements should be made available for purposes of subsection (c)(3)." *See* § 251(d)(2). In making that determination, the Supreme Court held in *Iowa Utilities Board*, the Commission must apply a meaningful "limiting standard" that is "rationally related to the goals of the Act." 525 U.S. 366, 388 (1999). As both the Commission and the D.C. Circuit have recognized, this includes the Act's ultimate goal of promoting meaningful facilities-based competition. *See USTA v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002); *Comptel v. FCC*, 309 F.3d 8, 16 (D.C. Cir 2002); *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 18 (2000) (recognizing that the broad availability of unbundled elements would undermine existing facilities-based competitors); *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 110 (1999) ("fundamental goal of the Act" is the

promotion of facilities-based competition, investment and innovation); Promotion of Competitive Networks in Local Telecommunications Markets, 14 FCC Rcd 12673, ¶ 4 (1999) ("only facilities-based competition" can "fully unleash competing providers' abilities and incentives to innovate")..

Once the Commission makes a determination that a given network element need not be made available on an unbundled basis under the standards in § 251, that determination is binding on the states. Indeed, the Act expressly provides that, in resolving open issues in state arbitration proceedings, the state commission "*shall*" resolve those issues to "meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251*." § 252(c)(1). Likewise, state commissions may not, outside the context of an arbitration proceeding, establish other access or interconnection requirements unless they are both "consistent with the requirements of this section," and do "not substantially prevent implementation of the requirements of this section and the purposes of this part." § 251(d)(3). Any state commission order that attempted to override this Commission's determination that a given element need not be unbundled under the standards in § 251, however, necessarily would be inconsistent with that section. And, by failing to give effect to a meaningful limiting standard, it would be inconsistent with the purposes of the Act, just as the Supreme Court found that the Commission's original unbundling rules were inconsistent with the purposes of the Act.

Consequently, once this Commission makes a determination that a given element need not be unbundled for purposes of § 251, a state commission is utterly without power to preempt that determination. As the Supreme Court has recognized, where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000). Where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns. *See, e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]"). Because a decision not to require the unbundling of a particular element "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," that decision necessarily preempts any inconsistent state regulation or requirement. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *United States v. Locke*, 529 U.S. 89, 110 (2000).

It is for precisely this reason that the Commission's pricing rules are binding on the states. Indeed, unlike the unbundling provisions, which expressly assign to this Commission the task of determining what elements must be made available, the Commission is assigned no express role when it comes to the pricing of unbundled elements. Rather, the states are expressly assigned the task of setting prices in conformance with the pricing standards set out in 252(d).

Nonetheless, the Supreme Court held in *Iowa Utilities Board* that the Commission has authority to establish pricing rules for unbundled elements, and that those rules are binding on the states.

Indeed, Verizon and other incumbents had argued in that case that, given the omission in §§ 251 and 252 of an express Commission role in determining prices, states retained their traditional authority over intrastate communication service under § 2(b) of the Act and the Supreme Court's decision in *Louisiana PSC,* 476 U.S. 355 (1986). They also argued that § 252 confirmed this continuing state role by assigning the states explicit authority to set the price of unbundled network elements. *See* 525 U.S. at 379-80, 383-84. The Supreme Court rejected both arguments. Instead, the Court held that § 201(b) gives the Commission plenary "rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996" (*id.* at 378). And it held that, as to provisions included in the amended statute, § 2(b) and *Louisiana PSC* cannot be understood to limit the Commission's § 201(b) rulemaking authority (*id.* at 380). As Justice Scalia explained on behalf of the Court:

> [T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. [*Id.* at 378 n.6 (emphasis in original).]

The Court further held that the states' explicit pricing authority under § 252 does not trump the Commission's rulemaking authority under § 201(b). The state commissions must exercise their authority to set specific prices in accordance with the pricing rules prescribed by the Commission. *See id.* at 384-85. Accordingly, states cannot circumvent the Commission's pricing rules by applying different standards in the context of state arbitration proceedings, nor may they establish access and interconnection obligations outside the context of an arbitration proceeding that apply pricing standards at odds with those established by this Commission.

In this case, of course, the issue is even more straightforward than the pricing issue confronted by the Supreme Court. Here, the Commission *is* expressly assigned the task of determining what network elements must be made available and that determination is expressly made binding on the states.

2. <u>To the extent an element that does not have to be made available under § 251 must still be unbundled under § 271, the terms under which it has to be made available are exclusively within the authority of this Commission and cannot be regulated by any state</u>.

a. The question of the interaction of the unbundling requirements of §§ 251 and 271 arises as a result of the Commission's previous conclusion that the specific unbundling requirements set out in items 4 through 6 of § 271's competitive checklist are separate and distinct from the unbundling obligations under § 251. Setting aside for the moment the question

of whether that is the only possible (or best) reading of the statute, the most straightforward way for the Commission to address the issue is, as Verizon has proposed, to forbear from requiring a particular element such as switching to be unbundled under § 271 where it no longer has to be made available under § 251.[1] There is no question that the Commission has the authority to forbear where the requirements of the checklist have been "fully implemented," as they must be to obtain long distance authority in a state. *See* § 271(d)(3)(A)(i). Forbearance also clearly serves the public interest in these circumstances because, in the absence of impairment, unbundling is not necessary to protect consumers or to assure just and reasonable rates and charges, and forbearance will promote vigorous, facilities-based competition. *See USTA v. FCC*, 290 F.3d at 427 (D.C. Cir. 2002) ("[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities"). Once the forbearance test is met — as it is here — forbearance is mandatory and binding on the states. 47 U.S.C. §§ 160(a) ("the Commission shall forbear"), 160(e) ("A State commission may not continue to apply or enforce any provision . . . that the Commission has determined to forbear from applying").

b. Even if the Commission does not reach the forbearance question in the current proceeding, its decision to remove a given element such as switching from the list of unbundled network elements under § 251 necessarily means that, just as states lack any authority to override that determination, they also lack any authority to dictate — under § 271 or any other provision of federal or state law — the price at which incumbents provide switching. That principle flows directly from the terms of the Act and the Supreme Court's decision in *Iowa Utilities Board.*

Indeed, the Commission itself previously recognized the salient principles in its *UNE Remand Order*. There, the Commission determined that, in certain circumstances, circuit switching and shared transport need not be unbundled under § 251. Because it concluded that § 271 nonetheless required Bell operating companies seeking long-distance approval to provide unbundled switching and transport, the Commission found it necessary to consider the relationship between the unbundling requirements of §§ 251-252 and the competitive checklist of § 271 — and, in particular, whether Bell operating companies were required to provide access to checklist elements at regulated prices.

The Commission recognized that the pricing standards set out in § 252 apply by the Act's express terms only to elements that must be provided on an unbundled basis under § 251. It correctly concluded, therefore, that "the prices, terms, and conditions set forth under sections 251 and 252 *do not presumptively apply* to the network elements on the competitive checklist of section 271." *UNE Remand Order* ¶ 469 (emphasis added). Accordingly, "if a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)," not in accordance with §§ 251 and 252. *Id*. ¶ 470. When the Commission removes a network element from the list of those that must be unbundled, based on a determination that "a

[1] *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 (filed July 29, 2002).

competitor is not impaired in its ability to offer services without access to that element," its determination embodies a finding that "competitors can acquire [that element] in the marketplace at a price set by the marketplace." *Id.* ¶ 473. Accordingly, "[u]nder these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, *the market price should prevail*, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market." *Id.* (emphasis added). In other words, the just, reasonable, and nondiscriminatory price for such an element is equal to the competitive market price. The Commission's analysis was plainly correct, and there is no reason here to second-guess its conclusion.

In the face of that well reasoned statutory analysis, once an element listed on the checklist does not have to be made available under § 251 and its accompanying pricing standard in § 252, a state commission is wholly without power to regulate the price at which a Bell operating company provides that element. Indeed, the Commission's determination that the price for elements provided under § 271 should be set by the marketplace is precisely the type of "policy judgment," made by a federal agency in the course of administering a federal statute, that the Supreme Court repeatedly has held necessarily preempts any inconsistent state requirement (*see* cases cited in point 1 above). There can be no doubt that this authoritative principle applies here. Although Congress gave the states specific and circumscribed pricing responsibilities under §§ 251 and 252 of the 1996 Act, it delegated to the Commission overall regulatory responsibility for implementing the Act, including the Act's pricing provisions, and the states are powerless to regulate in a manner that conflicts with the Commission's determinations. That was the Supreme Court's fundamental holding in *Iowa Utilities Board*. Accordingly, just as the Commission unquestionably had authority to adopt pricing standards that are binding on the states under §§ 251 and 252, where states *are* assigned a role in setting prices under the federal scheme, it unquestionably has authority to do so under § 271, where the states have no such role.

First, there is no question in the wake of *Iowa Utilities Board* that the Commission has authority to establish the pricing standards that apply to unbundled elements such as switching that are made available under § 271. Any obligation to provide unbundled elements under § 271 indisputably was imposed by the 1996 Act. And the Supreme Court expressly held that § 201(b) gives the Commission plenary "rulemaking authority to carry out the 'provisions of this Act,' which include [provisions] added by the Telecommunications Act of 1996." 525 U.S. at 378.

Second, the fact that § 271 itself does not by its terms assign the Commission a rulemaking role is wholly beside the point. Again, *Iowa Utilities Board* resolved that very issue. In that case, Verizon and other incumbents argued that the Commission was not expressly assigned a rulemaking role with respect to pricing, confirming that Congress intended to assign pricing to the states. The Commission responded that a provision that established a deadline by which the Commission had to act in those cases where it *was* assigned a role (§ 251(d)) implicitly gave it authority to also adopt pricing rules, even though it made no mention of pricing. The Supreme Court held that the debate was irrelevant. Because §§ 251 and 252 were part of the 1996 Act — and because the Commission had authority under § 201 to adopt rules implementing provisions of the 1996 Act *regardless* of whether it was granted rulemaking

authority in 251 and 252 themselves — the Court held that "[o]ur understanding of the Commission's general authority under 201(b) renders this debate academic." 525 U.S. at 383.

Third, there is no remotely colorable argument, in the wake of *Iowa Utilities Board*, that states retain authority over pricing under § 2(b) and *Louisiana PSC* on the theory that switching is an intrastate service within the jurisdiction of the states. On the contrary, that is the very argument that Verizon and other incumbents made in *Iowa Utilities Board* and that the Supreme Court squarely *rejected* with respect to matters addressed by the 1996 Act. Again, as Justice Scalia put it on behalf of the Court, there no longer is any question "whether the Federal government has taken the regulation of local telecommunications competition away from the States," because *"[w] ith regard to the matters addressed by the 1996 Act, it unquestionably has*." 525 U.S. at 378 n.6 (emphasis added).

Iowa Utilities Board therefore definitively establishes that it is of no consequence that the network element may be used in the provision of intrastate service and that the Commission's pricing authority under § 201(b) historically was limited to interstate and foreign communications. As *Iowa Utilities Board* makes clear, the old interstate-intrastate divide *does not apply* with respect to matters expressly covered by the 1996 Act. As to those matters — including the provision of unbundled switching or other elements provided under § 271 — it is the Commission's comprehensive rulemaking power under § 201(b), not the state's residual authority over intrastate communications, that determines regulatory jurisdiction. Thus, after *Iowa Utilities Board*, the Supreme Court's earlier decision in *Louisiana PSC*, on which the incumbents had relied for their jurisdictional argument in *Iowa Utilities Board*, has no operative force with respect to 1996 Act provisions.

Fourth, the state commissions plainly have no authority in a § 252 arbitration to prescribe the price for an element that is provided under § 271. Section 252(d)(1) by its terms authorizes a state commission to determine the price of network elements only "for purposes of subsection (c)(3)" of § 251. Once the Commission, acting under § 251(d)(2), has removed a network element from the list of those that must "be made available for purposes of subsection (c)(3)," *id.*, the pricing of that element necessarily falls outside the state commissions' explicitly limited § 252(d)(1) pricing authority. Further, even when the state commissions *do* have pricing authority under § 252(d)(1), they must exercise that authority in accordance with the Commission's regulations. For both of these reasons, when the Commission determines that the lawful price of a given network element is the price set by the competitive market, the state commissions have no authority to impose any other price.

Nor do the state commissions have any plausible basis for asserting jurisdiction under § 271 to regulate the price at which a Bell operating company provides access to unbundled switching for purposes of the competitive checklist. Indeed, unlike §§ 251 and 252, which allocate limited responsibilities to the state commissions, § 271 gives the Commission exclusive jurisdiction to determine whether a Bell operating company has met the checklist requirements for long-distance approval and exclusive jurisdiction to ensure that, once it receives such approval, the company continues to comply with the checklist requirements. § 271(b)(1), (d)(3), (d)(6). Although the state commissions have a consultative role "to verify the compliance of the

Bell operating company with the requirements of subsection (c)," § 271(d)(2)(B), they have no independent regulatory jurisdiction under that provision. As a consequence, the Commission's preemptive authority is even clearer with respect to § 271 than with respect to §§ 251 and 252, where the Supreme Court nonetheless held that the Commission's pricing rules are binding on the states. Given the Supreme Court's ruling in *Iowa Utilities Board*, the Commission's jurisdiction under § 271, to the exclusion of the states, follows *a fortiori* from the holding in that case.

Accordingly, when the Commission removes a network element from the list of those that must be unbundled for purposes of § 251 and determines that the competitive market price is the lawful price, its judgment necessarily forecloses contrary state regulation. A state commission has absolutely no jurisdiction to require an incumbent to provide access to such a network element at forward-looking prices or at any other regulated price.

3. Once switching need no longer be provided on an unbundled basis for purposes of § 251, the statute provides no basis for requiring the provision of the so-called UNE-platform.

When switching is removed from the list of unbundled network elements for purposes of § 251(c)(3), neither incumbent carriers in general nor Bell operating companies in particular will have any further obligation to combine switching with other elements or to provide complete services in the form of a UNE-platform.

First, the obligation to combine unbundled network elements derives from § 251(c)(3), which requires incumbent carriers to provide "access" to network elements "on an unbundled basis" and "in a manner that allows requesting carriers to *combine* such elements." (Emphasis added). The Supreme Court upheld the Commission's combination rules as a reasonable application of that language. *See Iowa Utilities Board*, 525 U.S. at 393-95; *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1683-87 (2002). Both the statutory language and the Commission's implementing rules, however, apply only with respect to network elements that meet the impairment test of § 251(d)(2). They have no application to elements that do not meet the impairment test and that consequently are not subject to unbundling for purposes of § 251(c)(3). To the extent that a component of the UNE-platform such as switching is removed from the list of elements that must be provided on an unbundled basis for purposes of § 251(c)(3), there is no longer a statutory basis for requiring the provision of the UNE-platform. That is precisely why the Supreme Court suggested in *Iowa Utilities Board* that its vacatur of Rule 319 "may render incumbents' concern [about the combinations rule] academic." 525 U.S. at 393. Its point was that, if one or more components of the UNE-platform such as switching were to fail the impairment test and were therefore removed from the list of unbundled network elements on remand, the Commission would have no statutory basis for requiring incumbents to provide the UNE-platform. And in that case, of course, the state commissions would likewise lack a legal basis for imposing such a requirement, for the statute assigns exclusively to the Commission the responsibility for determining which network elements meet the impairment test.

Second, although the § 271 competitive checklist requires Bell operating companies to provide switching unbundled from loops and transport, nothing in the checklist or in any other provision of § 271 furnishes a basis for requiring Bell operating companies to combine switching with other checklist elements or to provide competitors with access to the UNE-platform. Indeed, unlike § 251(c)(3), which expressly requires incumbents to provide access to network elements in a manner that facilitates combinations, and which the Commission was therefore able to interpret to mandate combinations on request, § 271 says not a word about combinations and accordingly leaves no room for any interpretation mandating combinations on request. For the same reason, the state commissions are powerless to mandate such combinations. As explained above, the Commission has exclusive jurisdiction to implement § 271 and to determine whether Bell operating companies qualify for long distance authority. The state commissions therefore may not rely on § 271 as a basis for imposing a combinations requirement. Nor may they somehow impose on Bell operating companies an extra-statutory combinations requirement. To do so would both trench on the Commission's exclusive jurisdiction and undermine the choices Congress made in passing the 1996 Act.

In sum, when switching is taken off the list of elements subject to mandatory unbundling for purposes of § 251(c)(3), competitors can demand access to combined elements and the UNE-platform only under the Act's resale provisions (§ 251(c)(4)), not under § 251(c)(3) or § 271. Or they can negotiate commercially reasonable arrangements for the provision of such combinations at competitive prices. What they cannot do is insist on the UNE-platform at below-market prices just as if every element of the platform were still subject to mandatory unbundling under the impairment test.

Sincerely,

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